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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 1018

MANUEL SANCHEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

SOL A. ABRAMS,
400 Montgomery Street,
San Francisco 4, California,
Attorney for Petitioner.

EDWARD L. CRAGEN,
710 Jack Tar Office Building,
1255 Post Street,
San Francisco 9, California,
Of Counsel.

Table of Contents

	Page
I. Jurisdiction	1
A. Opinions below	1
B. Abbreviations used herein	2
C. Nature of the case	2
D. Date of judgment sought to be reviewed	2
E. Denial of rehearing and extension of time	2
F. Statutory jurisdiction of this court	3
G. Questions presented for review	3
H. Applicable constitutional provisions, statutes and rules	4
II. Statement of the case	7
III. Argument	13
No probable cause	13
Denial of petitioner's motion to discharge counsel	18
Denial of petitioner's motion for a continuance	21
IV. Conclusion	24

Appendix "A"—Opinion of the Court of Appeals

Appendix "B"—Judgment of Court of Appeals

Table of Authorities Cited

Cases

	Page
Billeci v. United States, 290 F.2d 628 (9th Cir. 1961)	13
Brinegar v. United States, 338 U.S. 160	14
Carroll v. United States, 267 U.S. 132	14
Duke v. United States, 255 F.2d 721	19

Pages

Henry v. United States, 361 U.S. 98 14

Hernandez v. United States, 17 F.2d 373 (9th Cir. 1927) .. 16

Hewitt v. United States, 110 F.2d 1 (8th Cir. 1940) 22

Johnson v. United States, 333 U.S. 10 16

Jones v. United States, 362 U.S. 257 17

McDonald v. Hudspeth, 113 F.2d 984 (10th Cir. 1940) 18

Nardone v. United States, 308 U.S. 338 17

Wong Sun v. United States, 371 U.S. 471 ..... 14, 15, 16

Yaw v. United States, 228 F.2d 382 (9th Cir. 1955) 22

Constitutions

Constitution of the United States:

Amendment IV 16

Amendment V 4, 20, 23, 24

Amendment VI 4, 18, 20, 24

Rules

Federal Rules of Criminal Procedure:

Rule 41(e) 6

Rule 52(b) 7, 13

Rules of Practice, United States District Court, Northern District of California:

Rule 13(b) 7

Statutes

21 U.S.C. Section 176(a) 5

28 U.S.C. Section 1254 3

28 U.S.C. Section 1654 ..... 6, 18, 20

Texts

Wigmore on Evidence, Sections 286-290 23

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I. JURISDICTION

A. Opinions Below

No opinion was written by the District Court. The opinion of the Court of Appeals for the Ninth Circuit was entered on December 26, 1962, is reported in 311 F.2d 327 and is set forth in the appendix hereto. (Appendix, Exhibit A.)

B. Abbreviations Used Herein

References to the Reporter's District Court trial transcript are designated herein by the abbreviation "R.T.".

C. Nature of the Case

Petitioner was convicted in the District Court on two counts of violation of the Jones-Miller Act, Title 21 U.S.C. Sec. 176(a), (70 Stat. 570) to wit, unlawful sale and concealment of marihuana. On December 8, 1960, the defendant was sentenced to a term of five years imprisonment on each of said counts, the sentences to run concurrently.

The Court of Appeals sustained both of the convictions.

D. Date of Judgment Sought to Be Reviewed

On December 8, 1960, Petitioner was adjudged guilty on the aforesaid counts and was sentenced by the District Court to imprisonment for a period of five years on each count, the sentences to run concurrently.

The opinion of the Court of Appeals was filed on December 26, 1962. (Appendix, Exhibit A.) The judgment of said Court was filed on the same date. (Appendix, Exhibit B.)

E. Denial of Rehearing and Extension of Time

After the filing of the decision of the Court of Appeals, a Petition for Rehearing was submitted to the Court of Appeals and this Petition was denied on February 13, 1963.

On March 4, 1963 this Court extended to April 13, 1963 the time for filing this Petition.

F. Statutory Jurisdiction of This Court

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254 (62 Stat. 928).

G. Questions Presented for Review

Question No. 1

Where the Reporter's Transcript of record of the evidence adduced in a federal criminal trial shows no probable cause for an arrest and search by Government Agents, is evidence discovered as a result of the search obtained in violation of substantive constitutional rights protected by the Fourth and Fifth Amendments and not to be considered as evidence against the aggrieved party when challenged in the first instance on appeal; and, did the Court of Appeals so far depart from the accepted and usual course of judicial proceedings and decide that there was probable cause herein in a way in conflict with applicable decisions of this Court?

Question No. 2

When a defendant in a federal criminal trial informs the trial Court after the Government has rested its case in chief that his attorney will not cooperate with him, that he would hire another attorney or proceed in propria persona, that the attorney had failed to call certain material witnesses, is it prejudicial error and or a violation of the defendant's rights

secured by the Fifth and Sixth Amendments to deny the defendant's motion to discharge counsel?

Question No. 3

Where the Government fails to call available material witnesses, who have plead guilty to the same charges on which petitioner is standing trial and therefore cannot incriminate themselves by testifying, and it is apparent from the record what the said witnesses observed, is there an abuse of discretion or denial of due process by the trial Court in denying petitioner's motion for a short continuance in order to obtain their presence by petitioner?

H. Applicable Constitutional Provisions, Statutes and Rules

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject

for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

21 U.S.C. § 176(a) (70 Stat. 570) provides in part:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, * * *, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, * * *, shall be imprisoned * * *.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to author-

ize conviction unless the defendant explains his possession to the satisfaction of the jury."

28 U.S.C. § 1654 (63 Stat. 103) provides:

"In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

Rule 41(e), Federal Rules of Criminal Procedure, provides:

"A person aggrieved by an unlawful search and seizure may move the District Court for the District in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Rule 52(b), Federal Rules of Criminal Procedure, provides:

> "Plain errors or defects affecting substantial rights may be noticed (on appeal) although they were not brought to the attention of the court."

Rule 13(b), Rules of Practice, United States District Court, Northern District of California, provides:

> "A motion to postpone or continue a trial on the grounds of absence of a witness or evidence shall be made upon affidavit showing the nature and materiality of the expected testimony or evidence, and that diligent effort has been made to secure the witness or evidence."

II. STATEMENT OF THE CASE

The Petitioner was charged in two counts of a three count indictment. Count I charged Petitioner with the unlawful sale of approximately one pound of marihuana in the City and County of San Francisco, State of California, on April 25, 1960. Count II charged Petitioner with the unlawful concealing and facilitating the concealment of approximately five pounds of marihuana in the said City and County and State on the same date. The persons Elroy Jones and John Henry Martinez plead "Guilty" to the said charges in other proceedings. (R.T. 101.)

The Federal Narcotics Bureau originally received information from the United States Customs Service that large amounts of marihuana were being smuggled into San Francisco. They had utilized an informer by

the name of Raoul Miller who could make a purchase of same from a man by the name of Elroy Jones. The Service also informed the Bureau that they believed some of the marihuana was used and would be hidden at 383-A South Van Ness Avenue in San Francisco (R.T. 92), which is between 14th and 15th Streets. The officers and agents did not obtain a warrant. (R.T. 102.)

With this information, Federal Narcotics agents, Customs agents and Officers of the San Francisco Police Department staked out the said premises on April 25, 1960. (R.T. 92.) On said date the premises, a basement apartment, were rented to a Mrs. Sylvia Fultz, who lived there with her two children. (R.T. 115.)

Earlier in the evening on said date, Customs agents Samaduroff and Ziesnitz and Narcotics agents Feldman and Cain recorded the serial numbers of four $20.00 bills in Government funds (R.T. 22-3) in the office of the Federal Bureau of Narcotics. They left the Federal Building and met Raoul Miller across the street, searched him and his car, gave him the marked $80.00 and followed him to Van Ness between 14th and 15th Streets. (R.T. 23-4.) Miller was a special employee for the Customs Service and "assisted" them in "investigations". (R.T. 28-9.) His duties were to learn all he could about narcotics smuggling and traffic. (R.T. 29.) He assisted the San Francisco Office for three to four or possibly five months and worked on six to a dozen cases. (R.T. 30-31.) The record does not show the results of these other cases.

Prior to the arrival of Miller's car in the vicinity of 383-A South Van Ness and at or about 7:00 P.M. on April 25th, Agent Cain and Officer Fogarty of the San Francisco Police Department commenced a surveillance of the said premises. (R.T. 42.) At about 7:20 P.M., Petitioner drove up and parked his car almost in front of the said premises. (R.T. 44.) Another car, operated by John Martinez, parked directly in front of Petitioner's car. (R.T. 44.) Martinez had an unknown Mexican male with him. (R.T. 60.) At the time of the arrival of these said cars, all three persons were "unidentified persons". (R.T. 60.) When the cars parked, the persons got out of the car and had a ten to fifteen second conversation before they entered 383-A South Van Ness. (R.T. 62.) Martinez was carrying a large brown paper sack about two feet in length and eighteen inches in diameter. (R.T. 45.) Presumably, this was a standard grocery sack in that Petitioner testified that he saw a loaf of bread sticking out. (R.T. 144.)

After they entered the premises, Elroy Jones [who was not an informant at the time (R.T. 64) but was known to the agents as a defendant in another narcotics case (R.T. 91)], arrived on foot. (R.T. 47.) He had come from the direction of 16th Street. (R.T. 63.) He entered the premises at 383-A South Van Ness and came out (R.T. 63) four or five minutes later. (R.T. 64.) He walked across the street to the corner of 15th and South Van Ness and stood there while Miller walked up to meet him. (R.T. 64-5.) Jones and Miller had a conversation near a phone booth which lasted approximately one and one-half minutes. (R.T. 65.)

There was no evidence as to what was said in this conversation and Jones crossed the street and re-entered the premises at 383-A South Van Ness while Miller walked slowly down South Van Ness to his car. (R.T. 66.) Jones came out of the premises almost immediately, carrying a package in his right hand partially under his sweater and partially sticking out. (R.T. 66.) He crossed the street, joined Miller, and the two walked to Miller's car and entered it. (R.T. 66.) They remained in the car three to four minutes when Jones got out and Miller drove off. (R.T. 67.) Jones walked toward the grocery store which is located almost at the corner of 14th and South Van Ness. (R.T. 67-8.)

Martinez and the unidentified Mexican left the premises and went to a bar and cafe on the corner of 14th and South Van Ness. (R.T. 68.) Petitioner came out of the premises and walked toward the said grocery store with two children. (R.T. 84.) Shortly thereafter, appellant and Jones were walking on the South side of South Van Ness, toward 383-A. There were two children with them and Petitioner was carrying a bag of groceries. (R.T. 70.) Appellant and the two children went into 383-A South Van Ness and Jones continued down South Van Ness to his car which was parked between 15th and 16th Streets and drove off. (R.T. 71.)

When Miller drove off, he was followed by Agent Samaduroff to Market Street and Van Ness Avenue. (R.T. 25-6.) Miller handed a package to the agent which appeared to be marihuana (R.T. 26) and he radioed the other agents and so informed them. (R.T. 26-7; 49.)

After obtaining the above information, Agents Cain, Feldman, Wilkins, Fahey and Han and Officers Caulfield and Fogarty proceeded to 383-A South Van Ness. (R.T. 50.) They did not have a warrant. (R.T. 102.) Agent Cain tried the door. It was unlocked but not open. (R.T. 50.) Agent Cain knocked on the door and hollered in a loud tone of voice: "Federal Narcotics Agents. Open the door, I want to talk to you." (R.T. 50.) There was no response, but voices could be heard inside. He turned the latch to the door and it opened. Petitioner, another unidentified person and Mrs. Fultz were drinking coffee and eating cupcakes in the kitchen. (R.T. 51.) Cain approached appellant and again identified himself and Agent Feldman placed appellant under arrest for a violation of the Federal Narcotics Laws (R.T. 51), immediately after entering the premises. (R.T. 76.)

Petitioner was immediately handcuffed (R.T. 85) and the marked Federal money originally given to Miller was found on his person. (R.T. 77.) Agent Cain, thereafter, walked into the bedroom and found bulk marihuana spread out on the bed. (R.T. 77-78.)

Petitioner explained that Jones gave him the money to give to a friend. (R.T. 151; 77; 169.)

Only one agent, Ira C. Feldman, testified as to any purported admissions by petitioner. He stated that when he asked petitioner who the marihuana belonged to, petitioner said he was holding it for a friend. Later, petitioner purportedly told Feldman that the marihuana belonged to Martinez and that Martinez had left it at his house to sell. (R.T. 88, 100.) The

other agents that testified stated they did not remember any of the conversations with petitioner in the apartment. (Agent Samaduroff, R.T. 39; Agent Cain, R.T. 76, 79, 80; Agent Wilkins, R.T. 174.) Petitioner testified that the first time he saw the marihuana it was in the hands of an agent (R.T. 157, 163) and "they" kept insisting it was his and he insisted it wasn't. (R.T. 160-1.) It is interesting to note that Agent Feldman misplaced the grocery store heretofore referred to by approximately a city block. (R.T. 96, 203.)

Agents Cain, Feldman and Wilkins testified that petitioner said he lived at the premises. Petitioner and Mrs. Fultz denied this.

At the close of the Government's case, petitioner moved for a continuance on the ground that Martinez and Jones were necessary witnesses. Both had plead "Guilty" to the offenses charged herein. (R.T. 101.) Jones was on Federal probation (R.T. 101) and Martinez was in San Quentin Prison. The Court can take judicial notice that the Federal Probation office is in the vicinity of the trial Court and that San Quentin Prison is in Marin County which adjoins the City and County of San Francisco. Thus, both could have been obtained by process within a short time. However, the motion for a continuance was denied. (R.T. 122.)

Petitioner thereupon indicated to the Court that he desired to discharge his attorney and to hire another attorney. The request was denied. He then categorically discharged his attorney and moved for a mis-

trial. The Court denied the discharge and the motion. (R.T. 110-113.) The colloquy between petitioner, his counsel and the Court is set forth in the footnotes of the opinion of the Circuit Court in the appendix hereto. (Appendix, Exhibit A, fn. pages vi through ix, inclusive.)

III. ARGUMENT

NO PROBABLE CAUSE.

Petitioner did not move to suppress the evidence herein as required by Rule 41(e), Federal Rules of Criminal Procedure. The legality of the search and arrest were challenged in the first instance before the Court of Appeals under Rule 52(b), Federal Rules of Criminal Procedure. The Court of Appeals, Ninth Circuit, had refused to consider claims similar to those advanced by petitioner where no motion to suppress evidence had been made under Rule 41(e) in *Billeci v. United States*, 290 F.2d 628 (9th Cir. 1961). However, in petitioner's case, the Circuit Court held, acting under Rule 52(b), that there was no error in admitting the marihuana and marked money into evidence against petitioner. (See Appendix, Exhibit A, pp. v, vi.)

It is submitted that the Court of Appeals properly examined the facts and circumstances of the case to determine whether there was probable cause for petitioner's arrest and search for the first time on appeal under Rule 52(b), but that its conclusion that it was a legal arrest and search is erroneous.

This Court has restated as recently as this term in *Wong Sun v. United States*, 371 U.S. 471, 479, the standard of probable cause for making an arrest:

> "* * * It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion, see *Henry v. United States*, 361 U.S. 98, 101, though the arresting officer need not have in hand evidence which would suffice to convict. The quantum of information which constitutes probable cause—evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed, *Carroll v. U.S.*, 267 U.S. 132, 162—must be measured by the facts of the particular case. The history of the use, and not infrequent abuse, of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would 'leave law-abiding citizens at the mercy of the officers' whim or caprice.' *Brinegar v. United States*, 338 U.S. 160, 176."

Herein, the arresting federal agents had the following information *prior* to petitioner's arrest: (1) The United States Customs Service gave information to the Federal Bureau of Narcotics that large amounts of marihuana were being smuggled into San Francisco (R.T. 92); (2) they had utilized an informer by the name of Raoul Miller and Miller could make a purchase of marihuana from Elroy Jones (R.T. 92); (3) the United States Customs Service informed the Federal Bureau of Narcotics that they "*believed*" some marihuana would be hidden at 383-A South Van Ness Avenue, San Francisco (R.T. 92); (4) the agents staked out the said premises and saw three "unidenti-

fied persons" (one being the petitioner) enter—one had a large paper bag (R.T. 60); (5) thereafter, the said Elroy Jones arrived at the premises and went inside (R.T. 91); (6) four or five minutes later he left the premises and met Miller outside (R.T. 64-65); (7) Jones went back into the premises and came out with a paper bag which he gave to Miller in exchange for $80.00 in marked money (R.T. 66); (8) Jones walked toward a store on the corner of 14th and South Van Ness (R.T. 67-8); (9) appellant came from the premises and walked to the same grocery store with two children; and, (10) shortly thereafter, Jones, petitioner and the two children were walking together toward the premises. Petitioner had a bag of groceries. Appellant entered the premises and Jones continued to his car. (R.T. 70-71.)

On the basis of the aforesaid information, the agents entered the premises, *uninvited*, and arrested petitioner. *After petitioner's arrest*, a search of his person revealed the $80.00 in marked money and a search of the premises revealed the contraband.

Within the theory of *Wong Sun v. United States* (supra) there is no doubt that the agents had probable cause to arrest and search Jones. However, it is difficult to see any difference between the probable cause, or lack of same, for the arrest of appellant, Sylvia Fultz or the unidentified Mexican male who was on the premises. Taking any one of the ten points of information possessed by the agents, there is no probable cause for petitioner's arrest. Taking all the information, there was no probable cause for peti-

tioner's arrest. It is submitted that had the agents presented the information to the United States Commissioner, no warrant would have issued. And, in this regard, it should be noted that there was no pressing need to enter the premises without a warrant and that the agents should have applied for one from the Commissioner. See the concurring opinion by Justice Douglas in *Wong Sun v. United States* (supra) and the Fourth Amendment to the United States Constitution.

In *Johnson v. United States*, 333 U.S. 10, the government maintained that they had reasonable cause to arrest the defendant therein as she was the sole occupant of a room from which the smell of burning opium was emanating. After the arrest, the search revealed contraband. The Court said at page 16:

> "* * * the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. * * *"

There were more circumstances to indicate probable cause in the *Johnson* case than there are in the case at bar. The Government cannot herein justify the arrest by the search and the search by the arrest.

In *Hernandez v. United States*, 17 F.2d 373 (9th Cir. 1927), as herein, the officers who made the arrest knew nothing whatever of the defendant or his past conduct. The fact that he was seen coming from a suspected house in company with a suspected woman, and that he and the woman were walking down the street looking around in what the officers thought was

a suspicious manner constituted all the evidence of probable cause. The Court held that such falls far short of presenting probable grounds of suspicion supported by facts which would warrant a cautious man in believing that the defendant had committed a felony. At most, the circumstances were sufficient to cause only a suspicion. Mere suspicion or suspicious circumstances, it has been repeatedly held, do not create probable cause. Certainly, there were nothing more than suspicious circumstances pointing toward petitioner herein. At most, the agents had information upon which to start an investigation. Entering the premises without probable cause or without a warrant, the agents were trespassers with no legal right to arrest or search the petitioner.

Being trespassers at the residence of Sylvia Fultz, and having no probable cause to arrest petitioner, any evidence obtained by the agents while on the premises would be inadmissible against petitioner. See *Nardone v. United States*, 308 U.S. 338, for the "*fruit of the poisonous tree*" Doctrine. See also *Jones v. United States*, 362 U.S. 257, wherein it was held that a visitor has standing to attack the illegality of the search. This would apply to the marihuana found as a result of the search as well as the marked money found on defendant.

DENIAL OF PETITIONER'S MOTION TO DISCHARGE COUNSEL

The right to counsel is both constitutional and statutory. See *Sixth Amendment*, United States Constitution and Title 28, *U.S.C.* §1654 (63 Stat. 103).

It is submitted that where the Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall * * * have the assistance of Counsel for his defence,"

that the word "Counsel" embraces "effective and efficient."

Petitioner herein attempted to discharge his attorney after the government rested its case because "she won't cooperate with me." (R.T. 109, Appendix, Exhibit A, on pages vi and vii.) He also told the Court he would hire another attorney. (R.T. 110, Appendix, Exhibit A, fn. p. vii.) Thereafter, he *unequivocally* discharged his attorney and stated to the Court that he would conduct the case himself. (R.T. 110, Appendix, Exhibit A, fn. p. vii.) The Court refused to recognize the discharge. It is submitted that the Court prejudicially erred and was in violation of the *Sixth Amendment* in not allowing the defendant to discharge his counsel and proceed in propria persona.

In *McDonald v. Hudspeth*, 113 F. 2d 984 (10th Cir., 1940), the attorney made his first appearance two weeks prior to the first day of trial. On the day of trial, defendant told the Court that *differences* had arisen between himself and counsel and that he wanted other counsel. The trial Judge was not informed of the nature of the differences. The Court

refused and ordered the trial to proceed. It stated at page 985:

> "* * * * The trial judge might have thought that * * * he could not disregard the public interest and further delay the trial because of some *undisclosed reason.* * * *" (Emphasis added.)

The Court did not have to resort to conjecture herein inasmuch as the defendant was quite loquacious and specific as to his reasons for substitution and discharge. (R.T. 109-114, Appendix, Exhibit A, fn. pp. vi-viii, inclusive.) A careful reading of the petitioner's statements to the Court might well indicate to the Court that there would be no prejudice to petitioner with the discharge of counsel and that he would be fully competent and able to conduct his own case.

As stated in *Duke v. United States*, 255 F.2d 721, 724 (9th Cir., 1958):

> "* * * First, an accused has an unquestioned right to defend himself. Second, an accused should never have counsel not of his own choice forced upon him."

In the *Duke* case, Duke made an agreement with the Court to have counsel represent him with certain limitations. Duke was an attorney. He claimed on appeal that he had wished to proceed in propria persona. The Court stated at page 726:

> "Although there are expressions which, taken out of context, might indicate that Duke wished to proceed in propria persona, *he never at any time unqualifiedly took that position.* * * *" (Emphasis added.)

Petitioner cannot be held to the degree of knowledge or background of an attorney, though in his colloquy with the Court he appeared well able to represent himself. It is obvious from the Reporter's Transcript of the record that if petitioner had gone any further in protecting his record that he would have been in a more perilous position than he was. A contempt citation would have only compounded his problems. Appellant unqualifiedly took the position that he discharged counsel and wished to proceed in propria persona. It is submitted that the Court's refusal to grant the discharge was prejudicial error and in violation of the *Sixth Amendment*.

The discharge of counsel should not be confused with the motion for continuance (although, taken together, there appears to be an unchallengable denial of due process under the *Fifth Amendment*). If counsel had been discharged, it is possible and probable that petitioner would have proceeded with his defense. Conducting his own direct and cross-examination, the case might not have gone to the jury on the second day. At the end of the second day, personally or through other counsel, he could have had Jones and Martinez before the Court. The Court's ruling prevented this. The Court's refusal to deny recognition of petitioner's discharge of counsel was reversible error in that its ruling violated the provisions of the *Fifth* and *Sixth Amendments* as well as Title 28 *U.S.C.* 1654 (63 Stat. 103).

DENIAL OF PETITIONER'S MOTION FOR A CONTINUANCE

The government rested its case after eliciting testimony from four persons. They were George D. Crane, Chemist, U. S. Treasury Department; Paul Samaduroff, Agent, United States Customs Service; and Agents Lowell Cain and Ira C. Feldman, Federal Narcotics Bureau. Except for purported admissions made to Agent Feldman, the conviction could not stand as a matter of law regardless of the search and seizure problem. He is the only Agent who testified as to any purported admissions. Agents Fahey, Wong, Ziesnitz and Officers Fogarty and Caulfield, all present at the time of the arrest and search were not called by the Government. Agent Samaduroff (R.T. 39), Agent Cain (R.T. 76, 79, 80) and Agent Wilkins (R.T. 174) did not remember any admissions of petitioner. It should be pointed out that Agent Feldman is the Government witness who misplaced the grocery store heretofore referred to a full city block, bringing it into his view during the stake-out prior to the arrest and search. (R.T. 96, 203)

It is obvious from the record that petitioner was surprised by the testimony of the purported admissions and the failure of the Government to call Miller, Jones and Martinez. (See Appendix, Exhibit A, fn. pp. vi, vii, viii.) The record indicates that Jones, who was on probation, and Martinez, who was imprisoned in nearby San Quentin, were available to the prosecution and could be produced with little difficulty in a short time. Both had plead guilty to the offenses for

which petitioner was charged. (See Appendix, Exhibit A, fn. 4, p. iv.)

Though petitioner did not comply with Rule 13(b), Rules of Practice, United States District Court, Northern District of California, he personally informed the Court the reasons for which he desired a continuance. He wanted Martinez "that had this marihuana" and Jones "who gave me the money." (R.T. 110.) In *Hewitt v. United States*, 110 F.2d 1 (8th Cir., 1940), though the Court did not abuse its discretion in denying a motion for continuance, it stated at page 8:

> "* * * In the absence of any showing that a continuance would enable Hewitt to better defend himself against the charge that he aided in the commission of the robbery, we think the court did not err in denying his motion."

Hewitt moved for a continuance during the trial. No assurance was given the Court that if the continuance were granted the defendant would be benefited in any way. As stated heretofore, petitioner personally informed the Court of the necessity of having Jones and Martinez before the Court for his defense after the Government refused to call them. Since both had plead guilty and their testimony would not incriminate them, it might well be inferred or presumed that their testimony would be against the position of the Government. As stated in *Yaw v. United States*, 228 F.2d 382 (9th Cir., 1955), at page 383:

> "It is significant that the United States did not produce Peltier as a witness, he having plead guilty and hence his testimony as to when he acquired the cigarettes could not incriminate him. A witness available to the prosecution to maintain its burden of proof which it does not produce or explain why it cannot, is presumed one who would testify against the government. See Wigmore on Evidence, §§ 286-290."

It should not be forgotten that the Court on its own motion *could* have directed the Warden of San Quentin Prison by way of writ to have Martinez present the following day. It is submitted that there was an abuse of discretion requiring a reversal of petitioner's convictions and it appears from the record in its entirety that this petitioner has been denied due process of law under the *Fifth Amendment* of the United States Constitution.

IV. CONCLUSION

It is respectfully submitted that there was no probable cause for the arrest of petitioner and no probable cause for the search of the premises at 383-A South Van Ness Avenue or of petitioner's person. Therefore, all the real evidence herein cannot be used by the Government to sustain the convictions of petitioner and the said convictions should be reversed.

Petitioner's motion to discharge counsel should have been granted and failure of the trial Court to do so is prejudicial error and is in violation of the petitioner's rights secured by the *Fifth* and *Sixth Amendments* and the laws and customs of the United States.

Refusal of the trial Court to grant petitioner's motion for a continuance was an abuse of discretion and violated his rights secured by the due process clause of the *Fifth Amendment*.

Because of the foregoing, it is urged that a writ of certiorari issue and that the convictions herein be reversed.

Dated, San Francisco, California,
April 10, 1963.

SOL A. ABRAMS,
Attorney for Petitioner.

EDWARD L. CRAGEN,
Of Counsel.

(Appendix Follows)